challenge to the validity of the same agreement as part of a defendant's claim that the sued-upon agreement is invalid. The statement has no bearing on whether a party can sue to invalidate a facially effective, but allegedly fraudulently-induced, agreement in order to resurrect a prior, superseded agreement.

Textron expressly rejected the argument that § 301(a) confers jurisdiction over a suit to invalidate a labor contract based on fraud in the inducement. *Id.* at 654. This principle was applied by both the District Court and the Sixth Circuit below to bar Petitioners' effort to overturn the Plant Closing Agreement. The literal holding of *Textron* is thus on all fours with the decision below. The Burklow Employees attempt to evade the holding of *Textron* by ignoring their need to invalidate the Closing Agreement before they can present a claim for violation of the superseded Labor Contract.

The validity of the Closing Agreement is not "ancillary" to the Burklow Employees' action for breach of the 1998 Labor Contract within the meaning of *Textron*. To the contrary, the validity of the Closing Agreement is of primary importance. As pointed out by the District Court, Petitioners cannot reach their claims under the Labor Contract unless they first prove that the subsequent Closing Agreement is not valid and binding. *Burklow v. Baskin-Robbins USA, Co.*, 274 F. Supp. 2d 899, 904-05 (W.D. Ky. 2003). Unlike *Textron*, there are two agreements involved in this case. If, as *Textron* holds, § 301 provides no jurisdiction for a federal court to entertain a suit to invalidate the Closing Agreement based on fraud in the inducement, the Burklow Employees' arguments regarding the old Labor Contract are irrelevant. The Burklow Employees cannot piggyback jurisdiction to invalidate the

Closing Agreement on their claim that the superseded 1998 Labor Contract has been breached.

In attempting to apply the *Textron* dicta to challenge the Sixth Circuit's decisions in *Burklow* and *Bauer*, the Burklow Employees mischaracterize the nature of their suit on several levels. First, they ignore the effect of the superseding Closing Agreement. They claim that they have § 301 jurisdiction because their suit is **"for violation** of a contract." [Cert. Petition, pg. 12.] However, as the courts below found, their suit is really to invalidate the Closing Agreement in order to get to the claims under the Labor Contract. As this Court stated in *Textron*:

> [Section 301] erects a gateway through which parties may pass into federal court; **once they have entered**, it does not restrict the legal landscape they may traverse.

Textron, 523 U.S. at 657-58 (clarification and emphasis added). A federal court can thus adjudicate the validity of a contract under § 301 **after** plaintiffs achieve subject matter jurisdiction by bringing suit "for violation of" that contract. Petitioners have attempted to manipulate their claims to evade the limitations to this § 301 "gateway"; first they sued for violation of the superseded Labor Contract, then they attempted to invalidate the Closing Agreement in order to be able to reach their claims under the Labor Contract. Petitioners' suit "for violation of" the Labor Contract is ultimately a disguised suit to invalidate the superseding Closing Agreement. It is precisely this legerdemain that the Sixth Circuit has rejected, and nothing in *Textron* suggests that plaintiffs can simply ignore the subsequent § 301 agreement.

Petitioners' attempt to characterize Baskin's assertion of the superseding Closing Agreement as an "affirmative defense" of invalidity is erroneous as well. [Cert. Petition, pg. 12, n.1.] Pointing out the existence of a superseding contract is hardly analogous for § 301 purposes to a defense that the contract allegedly violated is invalid. Baskin's defense is that the existing Closing Agreement is the more recent, effective agreement between the parties; it is a defense of **validity**. Petitioners, not Respondents, raise the argument that the presumptively valid Closing Agreement is in fact invalid. Baskin's assertion that there is a valid, superseding agreement has nothing to do with the intrinsic validity of the Labor Contract; it addresses the fact that Petitioners are claiming violation of a contract that is no longer in effect. Petitioners' claims regarding the Labor Contract are irrelevant as long as the superseding Closing Agreement is valid. Since the Burklow Employees are attempting to invalidate the Closing Agreement, and are not claiming a violation of the effective contract between the parties, they cannot bring their suit in federal court under *Textron*, *Bauer*, *Adcox* or *Heussner*.

For all these reasons, the principle consistently upheld by the Sixth Circuit – that a federal court does not have jurisdiction to hear a § 301 claim premised upon an expired or superseded contract – does not conflict with this Court's decision in *Textron*.

II. The Sixth Circuit's Decision Does Not Conflict with Prior Decisions of the Seventh Circuit Court of Appeals.

Petitioners assert that the Sixth Circuit's decision below conflicts with the Seventh Circuit's decision in

International Union of Operating Eng'rs, Local 150 v. Rabine, 161 F.3d 427 (7th Cir. 1998). The Petitioners' attempt to manufacture a circuit conflict fails, since *Rabine* and *Burklow* do not reach inconsistent legal conclusions. Rather, the two cases involve different legal issues arising in markedly different factual settings.

Unlike *Burklow*, the *Rabine* decision did not involve a suit to invalidate a superseding contract; instead, it involved the enforcement of a single contract. In *Rabine*, the union had obtained three *ex parte* arbitration awards under its labor contract with the defendant. The defendant did not make the payments required by the awards or file a timely suit to vacate them. The union sued to enforce the awards under § 301 of the LMRA. The defendant argued that the contract was invalid from its inception because, since the defendant had no employees, it was not an "employer" with the capacity to enter into a labor contract under § 301. The district court agreed and held that it lacked jurisdiction under § 301 to enforce the arbitration awards. On appeal, the Seventh Circuit concluded that the question of whether the defendant was a statutory employer was not a "jurisdictional fact." Rather, the question went to the merits. Since the defendant's defense went to the merits rather than to jurisdiction, the defendant was not entitled to ignore the arbitration awards. Instead, it had waived its right to challenge them by failing to file a timely suit to vacate, and the awards were enforceable.

When put in context, the facts and holding of *Rabine* have nothing to do with this case. *Rabine* did not hold, as Petitioners claim, that the question of "whether a contract existed" goes to the merits of a § 301 claim. [Cert. Petition, pg. 16.] Rather, it concerned the much narrower question of whether the failure to meet the statutory definition of a

contract enforceable under § 301 goes to the merits. There is no such issue here. Moreover, the Sixth Circuit below did not hold that whether a contract "exists" is a jurisdictional question. It merely held, consistent with *Textron*, that the core jurisdictional requirement for a § 301 action is that the suit is for violation of an alleged § 301 agreement. 523 U.S. at 656.

Petitioners also argue that there is a split in the circuits because the Seventh Circuit applied *Textron*'s dicta that federal courts did have jurisdiction over § 301 cases in which defendants raised the defense of contract invalidity. [Cert. Petition, pg. 16.] This argument also fails because *Rabine* only examined the jurisdictional implications of an invalidity defense where one contract was involved. Petitioners fail to address the significance of the fact that *Rabine*'s holding, that a federal court has jurisdiction under § 301 to adjudicate a defendant's invalidity defense to a contract enforcement action, was only in the context of a challenge by the defendant to the validity of the same contract the suit was brought to enforce. In contrast, Petitioners here have sued for violation of a contract that was superseded by a second, presumptively valid and binding agreement. *Rabine* did not address whether a federal court has jurisdiction under § 301 in such a case to adjudicate the **plaintiff's** attempt to invalidate the superseding agreement. Consequently, the holdings in *Burklow* and *Bauer* do not conflict with *Rabine*.

Petitioners attempt to salvage their claim, however, by stating that a defense that "contract A is invalid" is no different from a defense that "contract B supersedes contract A rendering contract A invalid." [Cert. Petition, pg. 16.] This analogy is flawed. In *Textron*, this Court

stated that a plaintiff may bring a declaratory judgment action under § 301 to invalidate a collective bargaining agreement if the plaintiff has been accused of violating that agreement because, in that case, the "court's power to adjudicate the contract's validity is ancillary to, and not independent of, its power to adjudicate '[s]uits for violations of contracts.'" 523 U.S. at 658, 118 S. Ct. at 1629. *Textron* did not suggest that a plaintiff may bring a suit requiring the court to invalidate a superseding agreement that it has not been accused of violating simply because the plaintiff would prefer to reinstate a previous agreement.

There is nothing in *Textron* suggesting that pointing out the existence of a superseding contract is somehow analogous for § 301 purposes to a defense that the contract allegedly violated is invalid. This Court stated in *Textron* that § 301 does not prevent a party sued for breach of a labor contract from defending itself by alleging that the contract is invalid. Hence, the Court allowed the invalidity of a contract to be adjudicated in a § 301 action where the defendant raises the invalidity of that contract as a defense. Pointing out the existence of a superseding contract, however, does not attack the intrinsic validity of the contract sued upon. Rather, it merely demonstrates that the parties have, by agreement, replaced that contract with a new set of rights and obligations. The crux of the defense is thus the **validity** of the superseding agreement. The Sixth Circuit's decisions acknowledge that, in such cases, it is the plaintiff who is seeking to invalidate the superseding agreement as a pre-condition to obtaining adjudication of the claim for violation of the prior contract. Given this, a court cannot reach the breach of contract claim because it has no jurisdiction under § 301 to entertain the

plaintiff's suit to invalidate the superseding agreement. Plaintiffs cannot ignore the superseding contract in order to pass through the § 301 gateway into federal court, and then seek to invalidate the superseding contract based on the pretext that it is really the defendant who placed that contract's invalidity at issue.

III. The Sixth Circuit's Decision Does Not Conflict with This Court's Decision in *Steel Co. v. Citizens for a Better Env't*, or with Decisions from Other Circuits.

This Court's decision in *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83 (1998), is no more helpful to the Petitioners' argument than *Textron* or *Rabine*, both *supra*. The Burklow Employees challenged the Sixth Circuit's holding below by noting that in *Steel Co.*, this Court reaffirmed prior decisions holding that "jurisdiction ... is not defeated by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover." *Steel Co.*, 523 U.S. at 89, *quoting Bell v. Hood*, 327 U.S. 678, 682 (1946). The Burklow Employees also point out language that even if "one construction" of the laws underlying a petitioner's claims will result in the defeat of the claims, a district court clearly has jurisdiction if, under another construction, the petitioner's right to recover will be sustained. *Id.*

The Sixth Circuit's decision in the case below does not debate or even implicate these holdings. The District Court and the Sixth Circuit did not find a lack of jurisdiction merely because, in their view, the Respondents were "challenging the existence of an element of the members' claim." [Cert. Petition, pg. 20.] The jurisdictional issue here is not whether Petitioners fail to state a cause of

action, but whether they can even get into federal court under § 301 when the first step they must take is to invalidate the Closing Agreement. The challenged ruling of the Sixth Circuit has nothing to do with failure to state a claim. Rather, the Sixth Circuit ruled that the Burklow Employees do not have a "suit for violation" of a labor contract until they invalidate the superseding and presumptively effective Closing Agreement. Thus, when Petitioners attempted to bring their suit in federal court under § 301, it was primarily a suit to invalidate one agreement (Step One), and only secondarily a suit for violation of another agreement (Step Two). Since they cannot get into federal court under Step One (*see Textron*, 523 U.S. at 653), they do not reach Step Two. Thus, there is no "suit for violation" of a labor agreement – the core jurisdictional requirement for a § 301 action – and the court has no subject matter jurisdiction over Petitioners' claims under any proper construction of those claims. Accordingly, the Sixth Circuit's holding does not implicate the principles raised by *Steel Co.* and similar cases.

IV. Petitioners' Case Is Not Generally Certworthy.

A. The Sixth Circuit's Opinion in *Burklow* Is Unpublished.

This case has little precedential value in the Sixth Circuit because it is an unpublished decision. The Sixth Circuit has a rule stating that citation to unpublished opinions is disfavored. 6 Cir. R. 28(g). Thus, this case is a poor vehicle for resolving the conflict presented by the Petitioners.

B. Putting Aside the Issue of Jurisdiction, Petitioners' Case Fails on the Merits.

This case also is not certworthy since Petitioners' claims ultimately fail on the merits for several independent reasons, not implicated in the issue on which certiorari is sought. While the Burklow Employees attempt to escape the preclusive effect of the Closing Agreement by arguing that it was not validly ratified, the attacks on the ratification process fail.

First, any reasonable jury would have to find that the employees at the ratification meeting knew ratifying the Closing Agreement meant settling the claim underlying this action. Given the overwhelming evidence that both Baskin and Local 783 repeatedly informed the Burklow Employees, in writing, of settlement negotiations and the two options, given the repeated written advice that employees would be asked to vote on whether to settle or arbitrate, and given the complete lack of any action by the Burklow Employees for six months after the closing, no reasonable jury could sustain the Burklow Employees' claims.

Second, as co-Respondent Union points out in its brief, there is no evidence that any alleged statement by Union official Vincent affected the outcome of the ratification vote. Persons who voted against ratification can hardly have been induced to vote in favor of ratification by the alleged statement, and the Burklow Employees have not presented any evidence on which a reasonable jury could find that any person voting for ratification was induced to do so by the alleged statement of Vincent.

Third, there was no evidence presented below that Baskin participated in, or was even aware of, the alleged

misstatement of Vincent. Baskin was, therefore, legally entitled to rely on the vote as reported by the Union. Baskin is entitled to rely on the ratification vote unless it has knowledge that the vote was improper or procured by fraud. *Frenza v. Sheet Metal Workers' Int'l Ass'n*, 567 F. Supp. 580, 587 (E.D. Mich. 1983). There is no evidence that Baskin had any such knowledge.

Finally, the Burklow Employees have ratified the Closing Agreement by keeping the benefits and are estopped from bringing this claim at this point. The Burklow Employees filed the Complaint on August 31, 2001, while Baskin was still paying out benefits, in order to evade the statute of limitations. Then, they waited to serve the summons until late October 2001, after Baskin had finished paying out the $1.2 million in benefits. Had they brought up the claim in a timely manner, it would have been addressed at that time. Baskin would have had an alternative if the ratification vote was in fact ineffective – either attempting to negotiate a different settlement agreement, or, at a minimum, keeping the Plant open to obtain the benefit of the Burklow Employees' work for a year for the wages that they seek here. Having kept the benefits and having failed to raise the claim in a timely manner, the Burklow Employees ratified the Closing Agreement by their post-closing conduct.

CONCLUSION

For the forgoing reasons, Respondent Baskin-Robbins USA, Co., respectfully requests that the petition for certiorari be denied. The decisions of the lower courts on the question of jurisdiction do not conflict with – and

indeed follow – precedent from this Court and do not conflict with any decision from another circuit. Moreover, even if the District Court had accepted jurisdiction over the Petitioners' claims against Baskin, those claims would inevitably have been dismissed on the merits.

Respectfully submitted,

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